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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 785

SAN DIEGO ELECTRIC RAILWAY COMPANY,
A CORPORATION, *Appellant,*

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SAN DIEGO ELECTRIC RAILWAY COMPANY,
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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellee in the above entitled cause moves the Court to dismiss this appeal or to affirm the judgment below for the following reason:

There is no substantial federal question presented as a basis of jurisdiction in this Court, because appellant has not demonstrated that it has suffered unconstitutional or discriminatory tax treatment.

WHEREFORE, appellee moves the Court to dismiss the appeal in this cause for want of a substantial federal ques-

tion or, in the alternative, to affirm the judgment of the District Court of Appeal of the State of California in and for the Third Appellate District from which this appeal is taken, for the reason that appellant has not demonstrated that it has suffered unconstitutional or discriminatory tax treatment.

Argument in support of Motion, Statement of the Case, Including the Facts

This case involves the California Motor Vehicle Transportation License Tax Law[1] which imposes a license tax at the rate of three per cent upon the gross receipts of operators of motor vehicles engaged in the transportation of persons or property within the State of California. There are certain legislative exceptions from the imposition of the tax including transportation exclusively within incorporated cities or between incorporated cities where no portion of the public highway outside the corporate limits of the cities is traversed in the operation.[2]

During the month of August, 1945, appellant engaged in the business of transporting passengers by street railway lines and automobile bus lines in the city of San Diego and its environs. Five of such automobile bus lines traversed highways outside of incorporated cities and appellant has conceded, as it must, that it was an operator and subject to tax within the meaning of the applicable statute.

The gross receipts of appellant derived from the operation of its bus lines entirely within incorporated cities and the fares of passengers who rode the five interurban bus lines but whose rides were wholly within the limits of incorporated cities, however, were not subjected to tax. Only those gross receipts which appellant received from passen-

[1] California Revenue and Taxation Code, sections 9601 to 10501, inclusive.

[2] California Revenue and Taxation Code, section 9653.

gers, each of whom on one continuous trip traversed public highways in both incorporated and unincorporated territory, were included in the measure of the challenged tax.

Appellant's primary contention in the lower courts was that the statute should be so interpreted as to permit an apportionment of the fare of a passenger who was transported through both incorporated and unincorporated territory in a single trip according to the mileage traveled in each territory, the portion relating to travel in the unincorporated area only being subjected to tax. This contention, together with a method of apportionment suggested by appellant purporting to achieve such a result, was rejected by the lower courts.

The main burden of appellant's position here, however, is that the statute is discriminatory and unconstitutional in its application to it. We respectfully submit that these contentions also properly were rejected by the lower courts and are not substantial.

(1) *The tax treatment received by appellant was identical to that received by all other operators subject to the tax.*

It is to be noted first that the record in this action is devoid of any evidence that appellee State Board of Equalization has applied the tax to any other operator subject to this law in any manner different from its application of the law to appellant. On the contrary, the testimony of the California Transportation Tax Administrator to the effect that all bus line operators in California, including operators of bus lines in urban areas similar to that existing in the vicinity of San Diego, have been required to report and pay the tax in the same manner as was the appellant, was uncontradicted.[3]

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[3] Rep. Tr. p. 76, l, 17.
p. 78, l, 13.

(2) *Appellant has not demonstrated that it has suffered discriminatory or unconstitutional tax treatment.*

Appellant's assignment of errors is grounded upon the premise that the Motor Vehicle Transportation License Tax Law is a revenue measure designed to provide revenue for the State with which to maintain and repair public highways outside of incorporated cities. From this it argues that since it allegedly uses the highways less than certain other operators it should pay proportionally less tax than the other operators.

There are several fallacies in appellant's argument.

While the Motor Vehicle Transportation Tax Law may be generally classified as a highway-user tax, it is obvious that the tax is not exclusively related to highway use. Apt illustrations of taxable receipts from non-highway use are to be found in the factual situations presented in such cases as *Bekins Van Lines, Inc.* v. *Johnson* (1942), 21 Cal. (2d) 135, 130 P. (2d) 421, and *Southern California Freight Lines* v. *State Board of Equalization* (1945), 72 Cal. App. (2d) 26, 163 P. (2d) 776, where revenues from loading and unloading activities and pick-up and delivery service within incorporated cities were required to be included in the measure of the tax. Appellant has failed to give any cognizance to the receipts from terminal and other special services of operators which are and properly may be included in the tax base.

Little force remains, therefore, behind appellant's contention of unjustifiable discrimination as compared with Pacific Greyhound Lines and other operators, for the record is barren of any evidence indicating that such other operators are not subjected to tax to the same or greater extent upon receipts derived from other than highway use. In addition, appellant presented no comparative rate schedules or other evidence demonstrating that in fact it bore a

greater burden of tax than did other operators. In other words, appellant has not established that other persons in the same class have not paid taxes of equivalent burden. *Pacific Express Co.* v. *Seibert* (1892), 142 U. S. 339.

(3) *The Supreme Court of California has held there are no constitutional objections to the law as applied to appellant's operations.*

The constitutionality of the taxing statute as interpreted and applied herein has been considered on several occasions by the California Supreme Court. In the case of *In Re Bush* (1936), 6 Cal. (2d) 43, 56, 56 P. (2d) 511, 517, the Court said:

> "No valid complaint can be made that the act is unconstitutional by virtue of the fact that section 14 thereof exempts from its operation motor vehicles operated exclusively within incorporated cities or towns and also motor vehicles operating between incorporated cities or towns where no portion of the public highway outside of the corporate limits of said cities or towns is traversed in said operation. Similar provisions in the 1923 and 1925 acts were upheld in *Bacon Service Corp.* v. *Huss, supra,* ((199 Cal. 21, 248 Pac. 235)) and in *In re Schmolke, supra* ((199 Cal. 42, 248 Pac. 244)). The tax is placed upon those obtaining compensation for use of the public highways. *The fact that petitioner by reason of his operations upon the public highways outside the incorporated cities or towns is unable to bring himself within the exemption of said act, with the result that he is required to pay a tax based upon both his operations outside the incorporated cities and towns and also within the cities and towns, whereas those who bring themselves within the exemption are not required to pay a tax upon their city operations is not fatal to the validity of the act.* Some inequalities are bound to occur even in classifications which are manifestly fair and just." (Emphasis supplied.)

An appeal to this Court in *Bacon Service Corp.* v. *Huss*, was dismissed on December 12, 1927 (275 U. S. 507), similar action previously having been taken with regard to the case of *In re Schmolke* by this Court on December 6, 1926 (273 U. S. 646).

In the case of *Bekins Van Lines, Inc.* v. *Johnson* (1942), 21 Cal. (2d) 135, 141-142, 130 P. (2d) 421, 424, the California Supreme Court reaffirmed its views as follows:

> "There is no constitutional objection urged or which could be urged to the application of the plain language of the act. All the required safeguards have been afforded by the Legislature in the exercise of its taxing power. No unreasonable discriminations are involved and in the absence of any such unlawful classification the act is constitutional."
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> "No invalidity may be said to attach by reason of the fact that the plaintiff here is taxed on its intra-city pick-up and delivery service in connection with its intercity hauls as distinguished from its strictly intra-city business. (In re Bush, supra.)"

(4) *The cases cited by appellant are inapplicable.*

The only cases cited by appellant clearly are inapplicable to the problem at hand.

It was held in *Liggett* v. *Lee* (1933), 288 U. S. 517, that the equal protection clause forbade the imposition of a higher tax upon a chain operating in more than one county than a chain operating with the same number of outlets all in the same county. If appellant were complaining that it was subject to discrimination in that a higher tax was imposed upon it than others who operated wholly within a city, the *Liggett* case possibly would be of some interest, although of little value in view of such decisions as *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission* (1935),

295 U. S. 285. But appellant's complaint here is that it pays more tax than other intercity operators. As we have seen, the record is devoid of any evidence which would support such a position.

Continental Baking Co. v. *Woodring* (1932), 286 U. S. 352, involved a Kansas statute which exempted carriers operating wholly within cities and private carriers operating within a radius of twenty-five miles from the city limits. The Kansas tax administrators construed the exemption to mean that if a private carrier went beyond the twenty-five mile limit, the excess mileage would be used as the measure of the tax. The Court discussed this construction only in connection with an objection made as to the uncertainty of the statute stating specificaly at page 366 that the objection was ". . . distinct from that of unconstitutional discrimination".

Conclusion

Appellant's argument could better be submitted to the Legislature of the State than the courts. For if bus line operators in interurban areas are to receive a different application of the law than other types of operators who are subject to the Motor Vehicle Transportation License Tax Law, we submit that the Legislature is the branch of the government which must establish such special treatment. *Dane* v. *Jackson* (1921), 256 U. S. 589.

The appellant has been unable to bring itself within the legislative exemption from the tax; it has been required to pay its tax in exactly the same manner as all other taxpayers similarly situated; and it has not demonstrated that it has suffered discriminatory or unconstitutional tax treatment. For these reasons, we respectfully submit that a substantial federal question has not been presented and respectfully request that this appeal be dismissed or, in the alternative, that the judgment of the District Court of

Appeal of the State of California in and for the Third Appellate District be affirmed.

Respectfully submitted,

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